DATE: January 5, 1998

CASE NO: 95-INA-383

In the Matter of

G.D., INC.
Employer

on behalf of

MAHINDER KUMAR
Alien

Appearances: Daniel C. Gallagher, Esq.
for Employer and Alien

Before: Guill, Jarvis, and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from G.D., Inc.'s ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On November 22, 1993, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the New Jersey Department of Labor ("NJDOL") on behalf of the Alien, Mahinder Kumar. (AF 1-4). The job opportunity was listed as "Manager, Warehouse". The job duties were described as follows:

> Manage warehouse selling wholesale cosmetic and perfume products. Responsibilities include inventory, merchandise ordering, employee supervision, customer inquiries, pricing policies, sales promotion, cash receipts, operating records. (AF 4).

The stated job requirements for the position, as set forth on the application, included 2 years in the job offered or 2 years in the related occupation of Assistant Manager. Special requirements included the ability to speak Hindi, Punjabi, and Urdu languages. (Id.).

NJDOL did not refer any applicants to the Employer. NJDOL categorized the job opportunity as "Manager, Warehouse" under Dictionary of Occupational Titles ("DOT") code 184.167-114. (AF 35-37). The file was transmitted to the CO.

The CO issued a Notice of Findings ("NOF") on October 14, 1994, proposing to deny the certification for the following reasons: 1) The job opportunity is not clearly open to any qualified U.S. worker in violation of Section 656.20(c)(8), and there is no Employer/Employee relationship in violation of Section 656.3.[1] The CO found that "the corporation relies for its very existence upon the skills and abilities possessed by the alien."; 2) The job opportunity involves a combination of job duties: Manager, Warehouse (manage warehouse, responsible for inventory) and Manager, Sales (pricing policies, sales promotion). Pursuant to Section 656.21(b)(2), the Employer must document that he normally employs persons for that combination of duties or that the combination of duties arises from a business necessity; 3) The requirement of 2 years in the related occupation of Assistant Manager is unduly restrictive in violation of Section 656.21(b)(2). The CO found that the requirement implies experience in the job offered. The CO required that the Employer accept an Assistant Manager from any business since the alien qualified as an Assistant Manager at a chain drug

[1] The CO cited 656.50 which has been recodified 656.3.

store; and 4) The requirement of three foreign languages is unduly restrictive in violation of Section 656.21(b)(2). The CO found that the Employer failed to document a business necessity for the foreign language requirements. The CO found that the Employer prefers to conduct business in a foreign language and that a Warehouse Manager does not normally negotiate prices and terms. (AF 38-42).

The Employer submitted its rebuttal on November 17, 1994, which included a letter from the owner of the corporation, Mr. Gera. (AF 43-75). The Employer argued, inter alia, that the job opportunity does not involve a combination of job duties because the listed job dutie s are encompassed by the DOT classification of "Manager, Warehouse." In addition, the Employer argued that the CO cannot challenge the duties since the local office never raised the issue. (AF 63-64).

The CO issued a Final Determination ("FD") on November 28, 1994, denying certification. (AF 76-80). The CO found that the Employer successfully established that the job opportunity was open to any qualified U.S. applicant and that an Employer-Employee relationship does exist. However, the CO found that Employer failed to rebut that the job opportunity involved a combination of job duties, that Employer failed to document "that he normally employs persons for that combination of duties, and/or that the combination of duties arises from business necessity;" and that Employer failed to establish a business necessity for the foreign language requirement. (AF 77-78).

On December 19, 1994, the Employer filed a timely Request for Review. (AF 81-132).

Discussion

Under Section 656.21(b)(2)(ii), a combination of job duties is presumed to be an unduly restrictive requirement. The CO must look to the correct DOT job title - if there is one - to ascertain a position's customary duties. LDS Hospital, 87-INA-558 (Apr. 11, 1989). If an employer's job description lists duties that do not appear in any single DOT job description, then the proposed position requires a combination of duties. H. Stern Jewelers, Inc., 88-INA-421 (May 23, 1990). If the required duties do appear under a single DOT job heading, or are related to or consistent with the job duties in the DOT, then the duties do not constitute a combination of duties. Robert L. Lippert Theatres, 88-INA-433 (May 30, 1990). The DOT is merely a guideline and should not be applied mechanically. Promex Corporation, 89-INA-331 (Sept. 12, 1990). The DOT should not be applied in a pigeonhole fashion where there must be a complete matching of duties between the job offered and the DOT classification in order for a job to be appropriately classified. Merely because the duties of the job offered require some, but not all, of the duties included in a particular DOT classification does not nullify the applicability of that classification. Trilectron Industries, Inc., 90-INA-188 (Dec. 19, 1991).

The Employer, in both its rebuttal and appeal, argues that the CO cannot challenge the job duties because the local office did not raise the issue. We disagree. It is well established that the CO

is not bound by any statements or actions by the local employment service. Peking Gourmet, 88-INA-323 (May 11, 1989); Aeronautical Marketing Corp., 88-INA-143 (Aug. 4, 1988). The Employer argues that the Board in Bronx Medical and Dental Clinic, 90-INA-479 (Oct. 30, 1992) (en banc) held that:

> [W]hen the local office has failed to challenge the employer's job requirements that there is no requirement "in law or good sense for a Certifying Officer substituting, after the fact, his/her own judgment for the employer's job requirements and then penalizing the employer for having acted without regard to that judgment".

(AF 131 quoting Bronx Medical).

The Employer's reliance on this quote, is out of context, and is misplaced. Bronx Medical, as here, did not involve the CO challenging an employer's job requirements. On the contrary, in Bronx Medical , the CO accepted employer's "stated minimum job requirements" listed in items 14 and 15 of Form ETA -750. In that instance, the Board held, the CO may not then challenge employer's rejection of U.S. appllicants who facially did not satisfy those "accepted" requirements. In the case of bench, the CO has challenged Employer's job requirements outright. Bronx Medical does not limit the CO's ability to challenge whether there is a combination of job duties.

Next, the Employer argues that there is not a combination of duties. It argues that the job duties are encompassed by DOT category 184.167-114, "Manager, Warehouse". The Manager, Warehouse position is described in the DOT as follows:

> Directs warehousing activities for commercial or industrial establishment: Establishes operational procedures for activities, such as verification of incoming and outgoing shipments, handling and disposition of materials, and keeping warehouse inventory current. Inspects physical condition of warehouse and equipment and prepares work order for repairs and requisitions for replacement of equipment. Confers with department heads to ensure coordination of warehouse activities with such activities as production, sales, records control, and purchasing. Screens and hires warehouse personnel and issues work assignments. Directs salvage of damaged or used material. May participate in planning personnel-safety and plant-protection activities.

DOT 184.167-114.

The Employer argues that sales promotion and pricing duties are related to the duty of "sales." While that may be true, the classification does not include the duty of "sales." The "Manager, Warehouse" position does confer with department heads to ensure coordination of warehouse activities with such activities as sales; however, he/she does not engage in "sales" activities. The warehouse manager merely works with other individuals who perform the sales and purchasing functions. We agree with the CO that the job description involved a combination of job duties contained in the descriptions of "Manager, Warehouse" and "Manager, Sales." DOT 184.167-114, DOT 163.167-018.

Since we find that the Employer's job requirements constitute a combination of duties, there is a presumption that the job requirements are unduly restrictive. The presumption may be overcome if the employer demonstrates that: 1) it normally employs workers to perform that combination of duties; 2) workers customarily perform that combination of duties in the area of intended employment; or 3) the combination of duties is based on a business necessity. Section 656.21(b)(2)(ii). Here, the Employer failed to offer any evidence to rebut the presumption that the job requirements are unduly restrictive. Therefore, we agree with the CO's conclusion denying certification. See, e.g., U.S. Dyeing & Finishing, Inc., 95-INA-10 (Sept. 4, 1996).

Since we find that the combination of job duties is unduly restrictive, it is not necessary to consider the remaining issues.

Order

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California